IN THE

Supreme Court of the United States

October Term, 1978

No. 79-65

DOUGLAS S. GARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on February 8, 1979.

Opinion Below

The opinion of the District Court for the Northern District of California granting summary judgment for the United States, reported at 420 F. Supp. 300, is attached as Appendix A hereto, *infra*, pp. 1 through 7 inclusively. The opinion of the Court of Appeals for the Ninth Circuit affirming the District Court's decision is reported at 594 F. 2d 1230, and is attached as Appendix B hereto, *infra*, pp. 1 through 9, i-ii inclusively.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit (Appendix B, *infra*) was entered on February 8, 1979. A timely petition for rehearing by that Court was denied on April 19, 1979 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented for Review

1. Whether a state law (Nevada Revised Statutes 41.510),* enacted for the purpose of encouraging private landowners to open their land to the public for recreational purposes by limiting their liability, may be validly applied, as a basis for summary judgment in favor of the United States, in an action under the Federal Tort Claims Act in which the injurious occurrence took place on open public domain land held by the United States in its capacity as trustee for the public.

*Nevada Revised Statutes shall be designated herein as N.R.S.

2. Whether, if such state law was applicable, it can be validly construed to require explicit evidence of a design, purpose and intent to inflict injury in order to give rise to a triable issue of a "willful" failure to guard, or to warn against, a dangerous condition of land, so that summary judgment in favor of the United States was proper, even though there was evidence that, notwithstanding its realization that members of the public had been injured in dangerous abandoned mine shafts which were known to exist on open public domain land, it had knowingly refrained from taking any protective action whatsoever and it had consciously failed to comply with federal regulations and state laws which required safeguards and warnings concerning such dangerous mine shafts.

3. Whether the issue of the constitutional validity of a state law (N.R.S. 41.510) should be denied appellate consideration on the ground that the issue was not explicitly raised in the trial court, where the question involved is one of significant general impact and where grave injustice would result if a summary judgment in favor of the United States in an action under the Federal Tort Claims Act were to be upheld on the basis of a law which violates constitutional guarantees of equal protection of the laws.

Constitutional Provisions and Statutes Involved

The Constitutional provisions and statutes involved are: United States Constitution, Article IV, Section 3, Clause 2 (Public Land) Appendix D, *infra* p. 1; United States Constitution, Article VI, Clause 2 (Supreme Law of Land) Appendix D, *infra* p. 1; United

States Constitution Amendment XIV, Section 1 (Equal Protection) Appendix D, *infra* p. 1; Nevada Constitution, Article IV, Section 21 (Equal Protection) Appendix D, *infra* pp. 1, 2; 28 U.S.C. Section 1346(b) (Federal Torts Claims Act) Appendix D, *infra* p. 2; N.R.S., Section 41.130 (Liability of persons causing injury) Appendix D, *infra* p. 2; N.R.S., Section 41.510 (Sightseer or Recreational Use Statute) Appendix D, *infra* pp. 2, 3; N.R.S., 41.180 (former Guest Statute) Appendix D, *infra* p. 4; N.R.S. 455.010 (Fencing Statute) Appendix D, *infra* p. 5; 30 C.F.R. 57.20-20 (Restricted access) Appendix D, p. 5; 30 C.F.R. 57.20-21 (Closing off openings, danger notices) Appendix D, *infra* p. 5.

Statement*

Facts

Plaintiff Gard brought suit under the Federal Tort Claims Act for personal injuries he sustained when he fell down a vertical mine shaft in an abandoned mine he was exploring in the State of Nevada on December 30, 1972. (R.C.R. 1-5). Plaintiff, an eighteen-year-old University of California freshman, along with three fellow students, was returning from a trip taken on their Christmas vacation. (R.C.R. 48, 107; R. Gard DEPO. 5, 6, 26-28, 39-41, 66). While proceeding through Nevada on Interstate Highway 50, their attention was drawn to an A-frame apparatus covering an old mine approximately 150 to 200 yards from the roadway. (R.C.R. 48, 74; R. Gard DEPO. 39-43; R. Merritt DEPO. 18: R. Rarig DEPO. 15). They stopped and explored this mine, then proceeded to explore the mine where the accident occurred, which, along with two other mines, was approximately 100 yards from the first mine they explored. (R. Gard DEPO. 54; R. Merritt DEPO. 26-27). This mine, as well as some mine dumps, was visible from Highway 50. (R. McAlexander DEPO. 34, 35; R. Merritt DEPO. 19; R.C.R. 102, 104).

There were no barricades preventing entrance to the mine, nor were there any signs posted warning of a danger until after the accident occurred. (R.R.T. 1-15-76, 7-9; R. McAlexander DEPO. 35, 36). The mine looked relatively safe to enter. (R. Merritt DEPO. 28; R. Gard DEPO. 64). None of the youths was knowledgeable about mines. (R. Gard DEPO. 48; R. Merritt DEPO. 11; R. Rarig DEPO. 8, 9).

They entered through a horizontal tunnel, using a large policeman-type flashlight to illuminate their way. (R. Merritt DEPO. 29-31; R. Rarig DEPO. 29). About 80 to 100 feet from the mine entrance they came to a tunnel off to the left. After discussing which direction to go they proceeded onward; (R. Merritt DEPO. 30; R. Gard DEPO. 57) at which time the plaintiff either tripped over a ladder which was later seen to be partially protruding from the vertical shaft, or stepped directly into the vertical shaft, falling to the bottom. (R. Rarig DEPO. 28-33). As a result of the fall the plaintiff is a permanent quadriplegic. (R.C.R. 107).

*Reference to the record herein shall be designated as "R" with the following designations: Clerk's Record—C.R.; Reporter's Transcript—R.T., date, p.; Depositions—Name of the Party. DEPO. p.

The Federal Bureau of Land Management (Bureau) is responsible for the management of public domain lands, (R.C.R. 102; R. Webb DEPO. 5, 19) and the Mining Enforcement and Safety Administration (MESA) is responsible for the inspection of active mines within the State of Nevada. (R.C.R. 102).

Through the deposition and affidavit testimony of Mr. Robert T. Webb, the supervising engineer for the Bureau, (R. Webb DEPO. 5), Mr. Paul Shapiro, the sub-district manager in Reno, Nevada, of MESA (R. Shapiro DEPO. 3, 7, 20, 21) and Mr. Richard M. McAlexander, inspector for MESA (R. McAlexander DEPO. 3, 5-7) it was established that both governmental agencies were aware of the existence of the conditions which indicated the presence of the mine in question and the fact that it and other similar mines were visible from Highway 50. (R.C.R. 101-104; R. Shapiro DEPO. 38; R. McAlexander DEPO. 34-38). Mr. McAlexander had observed people camping in the vicinity where the mine in question was located (R. McAlexander DEPO. 38) and although he had noticed the mine dumps at an earlier date, he had not inspected them. (R. McAlexander DEPO. 34-35; R.C.R. 104).

The mine was located on public domain land which was free and open to public access for mining or for whatever purposes the public desired to enter. (R. Webb DEPO. 18, 19; R. Shapiro DEPO. 38; R. McAlexander DEPO. 35, 38; R.C.R. 50). There was no practice within the Bureau or MESA to warn the public of the dangers in mines or to board or close the inactive mines in any way. (R. Webb DEPO. 38, 39; R. McAlexander DEPO. 22-23).

MESA instructed its inspectors that federal regulation 57.20-21, which required the fencing and closing of all open or unguarded and abandoned mines, applied only to mines which became inactive after 1970. (R. Shapiro DEPO. 23-26). However, in dealing with mines abandoned after 1970 which were open and unguarded, MESA did not know how to enforce this regulation, and it was not enforced. Mr. McAlexander had inquired of his supervisors up and down the line as to how the section would be enforced, but no one had come up with any answer. (R. McAlexander DEPO. 9, 10; R. Shapiro DEPO. 28, 29).

MESA had never clearly spelled out to Mr. McAlexander his authority in connection with non-operational mines or abandoned mines, and he did not know what it really was. (R. McAlexander DEPO. 9). If he discovered an operating mine which had been abandoned with an open shaft or uncovered shaft, and he was unable to locate the owner, he simply left the shaft unprotected. He did not post any warnings, although he had signs available, nor did he report the open shafts to the Bureau of Land Management. (R. McAlexander DEPO. 22, 23). MESA was aware that there were numerous non-operating mines in the State of Nevada that were abandoned for many years. However, it made no attempt to inventory them or locate them in any way, even though it acknowledged that these openings did constitute a hazard to human beings. (R. McAlexander DEPO. 10-13).

The Bureau was aware of N.R.S. 455.010, which required fencing and guarding of all abandoned mine shafts, yet this statute was never utilized by the Bureau in the management of the federal property in the State

of Nevada. (R. Webb DEPO. 33, 34). MESA had not familiarized itself with the statute, although it acknowledged that it had a duty to do so. (R. Shapiro DEPO. 33).

Both the Bureau and MESA were aware of numerous mine workings similar to the subject mine in the State of Nevada, and that many of these mines contained vertical shafts, known as "winzes." They were further aware that members of the public explored these inactive abandoned mines and that numerous injuries had occurred, including specific instances where people had fallen down a winze. (R. Webb DEPO. 37-38; R. McAlexander DEPO. 16-18; R.C.R. 102). Even though they were aware of the injuries which had occurred in abandoned mine shafts, no suggestion had been made to any other department of the Federal Government that areas in the vicinity of the public highway be posted, warning of the potential danger, (R. Webb DEPO. 38-40) nor were any signs in fact posted advising the public to stay out. (R. McAlexander DEPO. 46). Anyone who has been around the industry knows that the exploration by the public of these abandoned mines present a dangerous condition. (R. McAlexander DEPO. 43, 44).

District Court's Decision

The District Court on September 20, 1976, granted the United States of America's motion for summary judgment (Appendix A, 1), holding that the imposition of liability for a willful or malicious failure to guard or warn under N.R.S. 41.510 required a showing of an intent to injure; and that the evidence failed to establish such an intent. (Appendix A 3, 4).

The District Court also held that the Nevada Fencing Statute, N.R.S. 455.010, was not applicable in that the accident occurred inside the mine (Appendix A 5-7); and in the event that the statute had been violated, the requirements of N.R.S. 41.510 precluded any liability. (Appendix A 7).

Decision of the Ninth Circuit

On appeal to the Ninth Circuit the court rejected plaintiff's argument that N.R.S. 41.510 does not apply to the United States in its capacity as the owner of public domain land. (Appendix B 4). The court upheld the District Court's determination that an intent to injure must be shown before liability could be imposed under N.R.S. 41.510 for a "willful" failure to guard or to warn. It also concluded that this statute would preclude liability for a violation of N.R.S. 455.-010. The District Court's alternative reasons for rejecting Gard's 455.010 claim were not considered. (Appendix B p. i, Note 3 to p. 8).

The Circuit Court further declined to consider the constitutional argument raised by the plaintiff, holding that plaintiff had offered no exceptional circumstances explaining why these claims could not have been raised before the District Court. (Appendix B 8).

Thereafter plaintiff filed a petition for rehearing with the Circuit Court, which was denied on April 19, 1979. (Appendix C).

Reasons for Granting the Writ

Point I

The summary judgment against the plaintiff was erroneously granted on the basis of a State Law (N.R.S. Sect. 41.510) which is not validly applicable to the United States in its capacity as the owner of public domain land which was open to the public without any congressional restrictions.

In an action under the Federal Tort Claims Act the standard of "the law of the place where the act or omission occurred" (28 U.S.C. Sect. 1346(b)) does not mean that every state law must be regarded as inexorably applicable. Where the United States is engaged in a uniquely governmental activity *Dix v. United States*, 296 F. 2d 20, 22 (2d Cir. 1961), or where the nature and legal incidents of the United States' relationship with other persons is specifically governed by federal law *Feres v. United States*, 340 U.S. 135, 142-146 (1950); *Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666, 671-672 (1977), the general language of the FTCA does not require that the vagaries of state laws are applicable as a basis for imposing liability upon the United States.

By the same token, there is no logical reason why the United States should be immunized from liability for injuries suffered on open public domain land by reason of the happenstance of a state law which was enacted for the purpose of encouraging private landowners to

open their land to the public for recreational use. Under the U.S. Constitution, (Article 4, Section 3, cl. 1) Congress has been entrusted with the exclusive responsibility of regulating the use of public domain lands, and its power is supreme. (U.S. Constitution, Article VI, cl. 2). Its power is both proprietary and legislative in nature. *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) reh. den. 429 U.S. 873 (1976). The incidents of the United States' ownership of public domain lands are unlike the incidents of any private person's ownership of land. In effect, Congress is the trustee of public lands for all the people. *United States v. San Francisco*, 310 U.S. 16, 28, reh. den. 310 U.S. 657 (1940). Among the privileges and immunities of citizens is the right to enter public lands for the purpose of perfecting homestead rights, *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), or mining rights. It is logically and legally incongrous to equate the United States' ownership of public domain lands with the ownership rights of private individuals, where access to public land is assured as a privilege of citizenship of the United States.

In this case summary judgment has been granted solely on the basis of N.R.S. 41.510. Both the District Court and the Circuit Court of Appeal have agreed that the purpose of this law is to encourage landowners to open lands to the public for recreational use. In return the state has agreed to reduce and limit the potential tort liability of such landowners.

Such a state statute is wholly inappropriate with respect to the rights and obligations of the United States. The public domain land involved in this case was open to the public. There were no congressional

restrictions upon its use. In a very real sense, it belonged to the public. There was no need to encourage the United States to open land which was open; to give the United States an immunity from liability under such inappropriate state law would frustrate the basic purposes of the Federal Tort Claims Act.

In rejecting the applicability of a sightseer statute to a public entity, the Supreme Court of Wisconsin, in *Goodson v. City of Racine*, 61 Wis. 2d 554, 558, 559, 213 N.W. 2d 16, 19 (1973) did so for two reasons. First, the introductory language to the statute stated that the act related to private land, and second:

> "Since municipalities had previously and do presently encourage its citizenry to make use of its property, such an action on the part of the legislature to encourage municipalities to allow use of its property would be purposeless." *Goodson v. City of Racine, supra*, 213 N.W. 2d 16, 19.

The Circuit Court has cited *Blair v. United States*, 433 F. Supp. 217 (D. Nev. 1977) and *Hamilton v. United States*, 371 F. Supp. 230 (D.C. Va. 1974) as authority for applying a sightseer statute to the United States. In neither of these cases, however, was the issue of applicability of the statute to the government as an owner specifically raised. In *Goodson, supra*, the Wisconsin Supreme Court distinguished *Garfield v. United States*, 297 F. Supp. (W.D. Wis. 1969) which had applied the sightseer statute to the United States, by stating: "A careful study of *Garfield*, however, indicates that the issue of whether the government is an 'owner' within the statute was never raised." *Goodson, supra*, 213 N.W. 2d 16, 19.

The Court of Appeal's assertion that the principle of encouraging landowners to open their land applies with equal force to the United States is unsound. (Appendix B, p. 4). Private land is normally reserved for private use. To make such land freely available to the public is a deviation from the norm. The converse is true with respect to public land. Such land is normally open to the public, and restrictions on the use of public land may only be directed by Congress. It is a logical and legal incongruity to apply a state law whose purpose is to encourage public use to public domain land which is presently freely open and accessible to public use. Insofar as the United States' ownership of such land is concerned, therefore, the purpose of the Nevada statute is meaningless.

Point II

Even if the Nevada statute was applicable to the United States in this case, the evidence was sufficient to give rise to a triable issue concerning the willful failure of the United States to guard or warn against a known dangerous condition, structure or activity on its open public domain land.

If N.R.S. 41.510 can be regarded as applicable to the United States, it becomes necessary to consider the meaning and effect of this statute. Since there are no Nevada Supreme Court decisions involving the statute, the task is to "attempt to determine from all available data the manner in which the Nevada Supreme Court would interpret the statute." *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F. 2d 486, 489

(C.A. 9th, 1976). The Nevada Supreme Court would consider decisions of other states which have construed statutes similar to the statute in question. *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 100, 450 P. 2d 358, 359 (1969). Since the statute modifies the traditional common law classification of entrance as invitee-licensee-trespasser,—*Liability of Land Owner to Persons Entering for Recreational Purposes*, 1964 Wisc. L. Rev. 705, 706 (1964), the statute would be strictly construed by the Nevada Court. *West Indies v. First Nat Bank*, 67 Nev. 13, 33, 214 P. 2d 144, 154 (1950).

Nevada adheres to the basic principle that words used in a statute are to be given their plain and ordinary meaning, unless a different meaning is provided in the statute. *Ex Parte Ming*, 42 Nev. 472, 492, 181 P. 319, 324 (1919). It is apparent that the statute in question imposes liability in the alternative, i.e., for a "willful *or* malicious failure to guard or warn." *Lewis v. Lewis*, 71 Nev. 301, 305, 289 P. 2d 414, 416 (1955). Both the Circuit and District Courts seem to have failed to recognize this fact, since they have, in effect equated willful with malicious, concluding that an intent to injure is required before liability may be imposed. (Appendix A, *infra*, 4; Appendix B, *infra*, 5).

The Court of Appeals of Georgia in *McGruder v. Georgia Power Company*, 126 Ga. App. 562, 563, 564, 191 S.E. 2d 305, 307; rev. on other grounds; *Georgia Power Company v. McGruder*, 229 Ga. 811, 812, 194 S.E. 2d 440, 441 (1972), construed the same language in the Georgia sightseer statute. Pointing out the disjunctive use of the word "or," the Georgia Court

held that there need not be an "intent to injure" to impose liability under the act. The court stated:

> " 'A "willful failure" imports a conscious, knowing, voluntary, intentional failure, a purpose or willingness to make the omission, rather than a mere inadvertent, accidental, involuntary, inattentive, inert, or passive omission' (citing authority). In the context of the whole statute, it would seem that a willful failure to guard or warn would require actual knowledge of the owner that its property is being used for recreational purposes; that a condition exists involving an unreasonable risk of death or serious bodily harm; that the condition is not apparent to those using the property; and that having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences." *McGruder v. Georgia Power Company, supra*, 91 S.E. 2d 305, 307.

Similarly, in *Miller v. United States*, 442 F. Supp. 555, 561 (N.E. Ill. E.D. 1976) the District Court construed the language of the Illinois sightseer statute and adopted a definition of willful which did not require an intent to do injury as a condition of imposing liability for willful failure to guard or warn, holding:

> " . . . we find that defendant could have discovered—in fact it knew—of the dangerous conditions at the west end boat dock, but it did nothing to remedy them or warn users against them. It willfully failed to guard or warn against a known dangerous condition." *Miller, supra*, 442 F. Supp. 555, 561, 562.

Both lower courts have relied upon language in *Crosman v. Southern Pacific Co.*, 44 Nev. 286, 301, 194 P. 839, 843 (1921). *Crosman* involved an accident in which the plaintiff was injured while riding in a velocipede car on the defendant's railroad tracks. It

was a dark night; there was no light on the car; and it was being operated against the current of railroad traffic. A backing switch engine collided with the car. It was conclusively shown that the defendant's employees were unaware of the plaintiff's presence on the track in time to avoid the crash. The Nevada Supreme Court held, therefore, that there was no evidence of any willful or wanton misconduct. In *Crosman* the Nevada Court considered the elements of willfulness as related to affirmative or positive action. In the present case the statute in question refers to a "willful" failure to take action. The meaning of such language clearly involves somewhat different considerations.

As used in the context of a failure to act, the plain meaning of the word "willful' would include a failure which is conscious, knowing, voluntary, willing or intentional. To engraft an intent to inflict injury upon the intent not to act would be to read into the statute an additional and unwarranted concept. The evidence in this case presented issues to be resolved in a trial of the facts, rather than by summary judgment; *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F. 2d 486, 488 (9th Cir. 1976); *Soria v. Oxnard School District Board of Trustees*, 488 F. 2d 579, 586 (9th Cir.) cert. den. 416 U.S. 951 (1974), particularly where the issue of willfulness placed in question the state of mind of the government employees. *Consolidated Electric Co. v. United States*, 355 F. 2d 437, 438, 439 (9th Cir. 1966); *Handi Inv. Co. v. Mobil Oil Corp.*, 550 F. 2d 543, 547 (9th Cir. 1977).

The evidence is sufficient to meet the standard of willfulness as announced in *McGruder v. Georgia*

Power Company, supra, and *Miller v. United States, supra*:

1. The United States had knowledge that public domain land in question was being used for recreational purposes; (R. Webb DEPO. 38, 39; R.R.T. 1-20-76, 11, 13; R. Shapiro DEPO. 38; R. McAlexander DEPO. 34-35, 38) and it was aware of the existence of the mine in which the plaintiff was injured. (R.C.R. 101-104; R. Shapiro DEPO. 38; R. McAlexander DEPO. 34-38).

2. A condition existed which involved an unreasonable risk of death or serious bodily injury. (R. Webb DEPO. 38; R.R.T. 1-20-76, 11; R. McAlexander DEPO. 17, 18, 38, 43, 44).

3. The condition of a vertical shaft was not apparent to those using the property. (R.R.T. 1-15-76, 7, 8; R. McAlexander DEPO. 35, 36; R. Merritt DEPO. 28; R. Gard DEPO. 64).

4. Having knowledge of the dangerous condition presented to those recreational users exploring abandoned mines, the United States chose not to guard or warn with callous indifference to the consequences. (R.R.T. 1-15-76, 7, 8; R. McAlexander DEPO. 10-12, 17, 22, 23; R. Shapiro DEPO. 27, 28).

At the very least the evidence supported inferences that the United States had knowledge of public use, a dangerous condition, prior accidents, and the public's unawareness of the dangers involved; yet the United States deliberately did nothing. It did not attempt even to locate the abandoned mines. If it did become aware

of abandoned mines, it remained deliberately passive. It did not comply with state fencing laws. It did not comply with federal regulations. Its incredible excuse was that it did not know how to comply with these regulations; it failed to guard or warn of the dangerous condition. Both lower courts have emphasized that no employee of the United States had ever inspected the clearly visible mine in which the accident happened. Aside from the fact that this fact merely illustrates the remarkable indifference of the United States' employees, it was their testimony that even if they discovered a dangerous mine, they would take no action whatsoever.

It is ironic that even though there was evidence that the United States had cavalierly disregarded one state law which required that measures be taken to protect the public against the hazard involved in unprotected shafts (N.R.S. 455.010), the United States has so far managed to shield itself from liability by seeking refuge in another state law which operates to erode or to destroy the rights of the public who come upon dangerous and negligently maintained land. (N.R.S. 41.510). To permit the United States to take such an ambivalent attitude toward state laws will result in an unjust frustration of the fundamental social purposes which underlie the Federal Tort Claims Act.

Point III

The constitutional validity of N.R.S. 41.510 is a question which should be resolved in this appeal, since the application of the statute is a matter of significant general impact, and a grave injustice would result if the United States should be immunized from liability to the plaintiff solely on the basis of this State Law which violates the constitutional guarantees of equal protection of the law.

A. The court erred in failing to consider plaintiff's constitutional argument.

The Circuit Court of Appeals has refused to consider plaintiff's constitutional challenge on the grounds that there were no exceptional circumstances to explain why these claims were not raised in the District Court. (Appendix B, *infra*, pp. 8, 9). This ruling misses the point. The correct rule is that where there are significant questions of impact or where an injustice might otherwise result, the court will consider a constitutional issue raised for the first time on appeal. *Hormel v. Helvering*, 312 U.S. 552, 557-559 (1941); *United Continental Tuna Corporation v. U. S.*, 550 F. 2d 569, 574 (9th Cir. 1977); *Krause v. Sacramento Inn*, 479 F. 2d 988, 989 (9th Cir. 1973); *Toyomenka, Inc., v. Mount Hope Fishing Company*, 432 F. 2d 722, 727 N. 10 (4th Cir. 1970); *Wratchford v. S. J. Groves and Sons Company*, 405 F. 2d 1061, 1063 (4th Cir. 1969); *Green v. Brown*, 398 F. 2d 1006, 1009 (2d Cir. 1968); *New York, N. H. and H. R. Co. v. Reconstruction Finance Corporation*, 180 F. 2d 241, 244 (2d Cir. 1950). It is

the importance of the issue which is the test, not the reason why it was not presented below.

This rule applies here. The statute involved is similar to those of some forty-three states. The applicability of such statutes to the United States, when sued as the owner of public domain land, is a question of significant general impact. Furthermore, the summary judgment in this case was based solely on this statute. If it is unconstitutional, an inexcusable injustice will result in failing to consider plaintiff's constitutional attack.

B. N.R.S. 41.510 is unconstitutional.

A statute may single out a class for distinctive treatment only if such classification bears a rational relationship to a legitimate legislative purpose. *McDonald v. Board of Education*, 394 U.S. 802, 808, 809 (1969); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Doubles Ltd. v. Gragson*, 91 Nev. 301, 303, 535 P. 2d 677, 679 (1975). For a classification to bear some reasonable relationship to a legitimate legislative purpose, there must be rationality in the nature of the classification singled out. *Rindali v. Yeher*, 384 U.S. 305, 308-309 (1966); *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 509, 538 P. 2d 574, 575 (1975).

The Nevada Supreme Court, in *Laakonen, supra*, 538 P. 2d 574, 579 invalidated the Nevada Guest Statute which bore a striking similarity in its legislative scheme to the statute in question. The Nevada Guest Statute, N.R.S. 41.180, barred passengers who gave no consideration for their ride from recovering from

the driver unless their injuries resulted from intoxication, willful misconduct or gross negligence. (Appendix D, p. 4). Similarly N.R.S. 41.510 provides that an owner, lessee, or occupant of a premises who allows a person to enter his premises for recreational purposes, without consideration, owes no duty to such a person unless there is a willful or malicious failure to guard, or to warn against, the hazardous condition. (Appendix D, pp. 2, 3).

In holding the statute unconstitutional the Nevada Supreme Court adopted the reasoning of the California Court in *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 212 (1973). The Nevada Supreme Court agreed with the California Court, that the denial of recovery for negligently inflicted injuries to those who by chance fall within the provisions of N.R.S. 41.180 does not bear a substantial and rational relationship to the statute's asserted purpose of protecting the hospitality of the driver. *Laakonen v. Eighth Judicial District, supra*, 538 P. 2d 574, 576-579.

The discriminatory elements in the Nevada Guest Statute which the Nevada Supreme Court condemned in *Laakonen* also appear in N.R.S. 41.510:

First, this statute treats non-paying recreational users of land differently from paying recreational users.

Second, it treats recreational users differently from all other users of the land.

Third, by differentiating between recreational users who give "consideration" and those who do not, the statute tends to encourage the creation of exceptions

and "loopholes" which render recovery largely fortuitous and add to the basic irrationality of the legislative scheme.

In concluding that there was not a sufficient rational basis for the statutory classification, the California Supreme Court stated in *Brown v. Merlo, supra*:

> "As Justice Harlan observed in his dissent in *Glona v. American Guarantee Co.* (1968) 391 U.S. 73, 81, . . . some 'classifications are impermissible [under the equal protection clause] because they bear no intelligible proper relationship to the consequences that are made to flow from them.' Insofar as the guest statute removes a passenger's protection from negligently inflicted injuries simply because he is a non-paying guest, we think the provision exhibits the unconstitutional vice to which Justice Harlan alluded." *Brown v. Merlo, supra*, 8 Cal. 3d 855, 866, 106 Cal. Rptr. 388, 396, 506 P. 2d 212, 220.

The court went on to state:

> "The claimed invidiousness of the guest statute lies not in the fact that it draws some distinction between paying and non-paying passengers, but rather in the fact that it penalizes guests by wholly depriving them of the protection against negligent injury." *Brown v. Merlo, supra*, 8 Cal. 3d 855, 866, 106 Cal. Rptr. 388, 396, 506 P. 2d 212, 220.

The court further stated:

> "Although defendant characterizes the guest statute's operation as following a common legal theme, no principle in our legal system dictates that one must pay a fee before he is protected from infliction of negligent injury. [*The court then referred to California Civil Code Section 1714, which is similar to Nevada Statute N.R.S. 41.130, which provides that an injured party may recover from injury inflicted by the wrongful or negligent acts of a tortfeasor.*] . . . Given this underlying legal principle, '[t]he fact that the guest pays nothing for riding with the owner furnishes no reason why the negligence of the latter should be excused.' " *Brown v. Merlo, supra*, 8 Cal. 3d 855, 867, 106 Cal. Rptr. 388, 396, 506 P. 2d 212, 220. (Italics inserted).

The socially undesirable consequence of the Nevada statute is to encourage negligence as a reward for opening rural land for recreational purposes, especially if the restrictive interpretation of "an intent to injure" is read into the requirement of "willful." In a society based on law and justice a statute which encourages negligent behavior is violative of the equal protection of law. Such a statute lacks any legitimacy in insuring rational human behavior, and it is contrary to the basic policy of Nevada itself, which has declared that "whenever any person shall suffer personal injury by a wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages." N.R.S. 41.130.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. NILAND,

MICHAEL G. BRISKI,
Of Counsel.

Attorney for Petitioner.

I. EDWARD J. NILAND, a member of the Bar of the Supreme Court of the United States and counsel of record for DOUGLAS S. GARD, petitioner herein, hereby certify that on July 12, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by depositing such copies in the United States Post Office, 105 North First Street, San Jose, California 95113, with first-class postage pre-paid, properly addressed to the post office address of Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

DATED: JUL 12 1979

BOCCARDO, LULL, NILAND & BELL,

By *EDWARD J. NILAND*

EDWARD J. NILAND,

111 West. St. John Street,
San Jose, California 95113,
Telephone: (408) 298-5678.

APPENDIX A

DECISION OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL
FILED

SEP 20 1976

CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS S. GARD, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	No. C-74-1971-CBR ORDER GRANTING SUMMARY JUDGMENT

This is an action brought under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq. to recover damages for injuries plaintiff suffered from falling down a vertical shaft inside an abandoned mine on United States Government land in Churchill County, Nevada. Plaintiff claims that his injuries resulted from the Government's negligence in failing to take measures to protect the public from the danger presented by this mine. Defendant has moved to dismiss the case for failure to state a claim or, in the alternative, for summary judgment. A hearing was held on January 20, 1976. At that hearing the parties indicated they needed further discovery before the Court could properly rule on defendant's motion. The parties have concluded the necessary discovery, and the matter is now ripe for decision.

In December, 1972, plaintiff and three friends, all California college students, embarked upon a short vacation drive through parts of Nevada. As the group was returning to California on December 30, 1972, along Interstate 50, their attention was caught by an A-frame apparatus covering an old mine located approximately 200 yards from the highway. The mine had a vertical shaft, and three of the four men, including plaintiff, descended a wooden ladder to the bottom. It was apparent that the mine was old and deserted and that it had not been kept in a state of repair.

After exploring the vertical A-frame mine, the group decided to explore other mines in the area. The mine in which the accident occurred (hereinafter "the mine") was approximately the same distance from the highway as the A-frame mine, but it was not as noticeable. This mine also appeared to be old, deserted, and not kept in a state of repair. The four entered the mine single file through a horizontal shaft cut into the side of a hill, with plaintiff second in line. Their only equipment was a single flashlight. About 50 feet into the mine, the third man, Rarig, complained that he was not receiving enough light. The flashlight was given to him and the group proceeded further along the horizontal shaft. At approximately 100 feet into the mine the men discovered a horizontal tunnel to the left. They discussed which branch to take and decided to go straight ahead. Plaintiff then took the lead, and the third man in line kept the flashlight. Almost immediately, plaintiff either tripped or stepped into a vertical shaft and fell to the bottom. The impact of the fall caused plaintiff to become a permanent quadriplegic.

The Federal Tort Claims Act allows plaintiffs to recover damages for injury

> "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b).

It is undisputed that plaintiff was engaged in "sightseeing" or other "recreational" activities when he incurred his injuries, and that he had not received permission from the United States to enter the mine. Nevada law provides that:

> "An owner * * * of premises owes no duty to keep the premises safe for entry or use by others for * * * sightseeing, or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on such premises to persons entering for such purposes, except as provided in subsection 3 of this section." Nevada Revised Statutes ("NRS") 41.510.

Subsection 3 provides that:

> "3. This section does not limit the liability which would otherwise exist for:
> "(a) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." Ibid. (emphasis supplied).

Thus, plaintiff cannot recover damages under Nevada law,[1] and, hence, the Federal Tort Claims Act, unless he can show that a federal employee willfully or maliciously failed to guard or warn against the danger presented by the mine.

---

1 In hopes of taking advantage of the California rule on comparative negligence, plaintiff argues that California law should govern in this case rather than Nevada law. See Li v. Yellow Cab Company of California, 13 Cal.3d 804, 119 Cal.Rptr. 858 (1975). This argument is inconsistent with plaintiff's position that defendant is negligent, because it violated Nevada law. Moreover, the only Nevada case plaintiff cites in support is Tab Construction Co. v. Eighth Judicial District Ct., 432 P.2d 90 (Nev. 1967), but the court in that case held that Nevada law should apply.

The purpose of NRS 41.510 is to encourage Nevada land owners to let sightseers use their land for recreational purposes. To hold that the law does not apply to sightseers from other states would thwart that purpose. In any event, plaintiff's chances would not be improved by applying California law since California has a sightseer statute substantially the same as NRS 41.510. See California Civil Code §846 (Supp. 1976).

Forty-three states have "sightseer" statutes similar to NRS 41.510. The purpose of such a statute is

> "to encourage owners of land within rural areas to make land and water areas available for recreational purposes by limiting their liability towards persons entering thereon for such purposes." Colorado Rev.Stat., Title 33, Art. 41, §101.

The Nevada legislature clearly envisioned limiting liability under its statute to landowners who intentionally allow dangerous structures to remain unguarded and without warning, with the knowledge that someone will be injured. Under Nevada law, in order for a defendant to commit a willful injury, "'there must be design, purpose and intent to do wrong and inflict the injury * * *.'" Crosman v. Southern Pacific Co., 194 Pac. 839, 843 (Nev. 1921); Rocky Mountain Produce Trucking Co. v. Johnson, 369 P.2d 198, 201 (Nev. 1962). Similarly, malicious acts are those done intentionally without justification or excuse. See Linkhart v. Savely, 227 P.2d 187, 197 (Or. 1951).

The undisputed facts of this case fail to show that defendant or any of its employees willfully or maliciously failed to guard or warn against the mineshaft that caused plaintiff's injuries. There is no evidence that any employee of the United States had ever even inspected the mine. Defendant submitted affidavits from Robert T. Webb, the Supervisory Mining Engineer for the Nevada State Office of the United States Bureau of Land Management, and Richard M. McAlexander, a mining engineer employed by the Mining Enforcement and Safety Administration, United States Bureau of Mines. Both Webb and McAlexander stated that they had never personally viewed the mine before the accident, and they had only suspected that it existed because of nearby mine dumps visible from the highway. Moreover, Webb stated that in the 10 years he has overseen the Bureau's mineral management program in Nevada, he has never

noticed any activity or persons in the vicinity of the two mines involved here, has never received any other expression of concern about the mines' safety from members of the public or federal employees, and has never heard of any other accident involving either mine. He also states that to his knowledge no Bureau of Land Management employee had ever been in either mine before the accident in this case.

Plaintiff argues that the United States violated NRS 455.010 by not erecting some kind of safeguard at the entrance to the mine. NRS 455.010 was enacted in 1866 and provides that the owner

> "of any shaft, excavation or hole, * * * [shall] cause to be erected, good and substantial fences or other safeguards, and keep the same in good repair, around such works or shafts, sufficient to guard securely against danger to persons and animals from falling into such shafts or excavations."

The statute's only sanction is a $100.00 fine and it contains no provision for creating a civil cause of action.

An examination of NRS 455.010 and the Nevada court decisions interpreting it indicates that the statute does not apply to this case. The leading Nevada case interpreting NRS 455.010 is Orr Ditch & Water Co. v. Justice Court of Reno Tp., 178 P.2d 558 (Nev. 1947), in which the Nevada Supreme Court was saddled with the task of determining whether irrigation ditches were included within the meaning of "excavation" in the statute. After some 19 pages of analysis, Justice Horsey concluded that they were not. Justice Horsey tracked the history of the statute and determined that the legislature had intended to protect individuals and animals from inadvertently falling into the numerous expose holes that had been dug around mining towns in search of ore and water. 178 P.2d at 575-576. The court also pointed to the great cost that would be involved in fencing irrigation ditches as further

evidence that the legislature had not intended to include them in the statute.

The entrance to the mine in this case is horizontal. The purpose of NRS 455.010 is to protect "persons and animals from falling into * * * shafts or excavations." (Emphasis supplied.) This language, together with the historical backdrop discussed in Orr Ditch, makes it apparent that the legislature did not intend the statute to apply to horizontal tunnels leading into mines. The Supreme Court of the State of Washington has held that a Washington statute identical to NRS 455.010 does not require the fencing of horizontal mine entrances:

> "In view of the language of this statute [now codified at RCWA 78.12.010] and the dangerous results which were sought to be prevented, it cannot be said that the statute means, when it says that the guards are for the purpose of preventing the 'falling' of persons into excavations, that thereby tunnels and slopes should have been so guarded that no one could walk into them. * * * The deceased, having voluntarily walked into the passageway, cannot be said to have 'fallen' into it, nor was the passageway of such character as to make it possible for him to 'fall' into it. The purpose of the law was to prevent an involuntary entrance into a 'shaft, excavation or hole'." Dernac v. Pacific Coast Coal Co., 188 Pac. 15, 16 (Wash. 1920).

The vertical shaft into which plaintiff fell was located within the mine. NRS 455.010, however, does not apply to such shafts. As discussed above, the purpose of the statute is to protect persons and animals who are, in effect, "minding their own business" and unexpectedly fall into a hole. The court in Orr Ditch speaks of protecting pedestrians and roaming cattle, not people who realize they are inside a mine. 178 P.2d at 576. Had the legislature intended to deal with shafts inside of mines, they would have used more specific terms such as adit or winze. Moreover, since the statute does not differentiate between operating and non-operating mines, plaintiff's construction of the statute would require owners to erect barricades inside working mines -- a practice that would

undoubtedly interfere with mining operations. Finally, the cost of exploring the thousands of abandoned mines in Nevada and barricading any winzes contained therein would be staggering.

Even if the United States had violated NRS 455.010, plaintiff could not recover damages in this case. Violation of a general criminal statute that does not create a civil cause of action is only evidence of negligence or, at most, constitutes negligence per se.[2] See W. Prosser, Law of Torts 200-202 (4th ed. 1971). NRS 41.510, however, requires plaintiff to prove that defendant's omissions were willful or malicious. Hence, even if the United States were held negligent as a matter of law, plaintiff would not meet his burden.

There is no dispute as to any material fact in this case, and plaintiff has, as a matter of law, failed to show that the United States willfully or maliciously failed to guard or warn against the dangerous condition existing within the mine where plaintiff was injured.

Accordingly, IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted.

Dated: September 17, 1976.

Charles B. Renfrew
Charles B. Renfrew
United States District Judge

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2 The two Nevada decisions holding defendants liable for civil damages resulting from their violation of NRS 455.010 have both done so on the ground of negligence. In Anderson v. Feutsch, 103 Pac. 1013, 1013-1014 (Nev. 1909), the plaintiff alleged that "the defendants had negligently failed to properly safeguard to prevent accidents to pedestrians passing along" the street. The court found that "this is not such a case that defendants could be relieved of responsibility by showing that, if negligence existed, it was the fault of an independent contractor." In Dixon v. Simpson, 332 P.2d 656, 658 (Nev. 1959), the court followed the decision in Anderson v. Feutsch. While the court spoke of the plaintiff's contention that liability was imposed on the defendant by NRS 455.010, it decided the case on the ground of negligence. See Cosgriff Neon Company v. Mattheus, 371 P.2d 819, 822 (Nev. 1962); Belcher v. Nevada Rock & Sand Company, 516 F.2d 859, 861 (9 Cir. 1975).

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS S. GARD, Plaintiff-Appellant,	)	
vs.	)	No. 77-1484
UNITED STATES OF AMERICA, Defendant-Appellee	)	MEMORANDUM

Appeal from the United States District Court for the Northern District of California

Before: MOORE,*WRIGHT, and CHOY, Circuit Judges.

Plaintiff Gard appeals from the district court's granting of defendant's summary judgment motion in his personal injury action against the United States. We affirm.

I. Statement of the Case

During their Christmas vacation from college in 1972, Gard and three friends took a car tour through Nevada. The four students were between 18 and 19 years old. While driving, the men saw an A-frame apparatus covering an old mine on federal property approximately 200 yards from the highway. The mine had a vertical shaft, and Gard and two of his friends descended a wooden ladder to the bottom. It was apparent that the mine was old and deserted and had not been kept in repair.

After leaving the A-frame mine, the men decided to explore other mines in the area. The four entered the mine in

* Hon. Leonard P. Moore, Senior United States Circuit Judge, for the Second Circuit, sitting by designation.

which Gard's accident occurred. It was as far from the road as the A-frame mine, but not as noticeable. It was also old, deserted, and in ill-repair. The four men entered the mine in single file. After a while, their only flashlight was passed to the third man in line. About 100 feet into the mine they discovered a horizontal shaft. While the third man retained the flashlight, Gard took the lead and proceeded down the horizontal tunnel. Almost immediately he either tripped or stepped into a vertical shaft and fell to the bottom. The impact of the fall caused Gard to become a permanent quadriplegic.

Gard brought suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671. Gard claimed that the Government had been negligent in not protecting the public from the dangerous mine. The Government moved to dismiss the case for failure to state a claim, or in the alternative, for summary judgment. After a hearing and after affording the parties more time for discovery, the district court granted the Government's motion for summary judgment. Gard v. United States, 420 F.Supp. 300 (N.D. Cal. 1976).

II. Standard of Review

This court has noted the standard for reviewing a granting of summary judgment:

> First, is there any genuine issue as to any material fact? Second, if there is no genuine issue of fact, then, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, is the movant entitled to prevail as a matter of law. [sic]

MGM Grand Hotel, Inc. v. Imperial Glass Co., 533 F.2d 486,

488 (9th Cir.), cert. denied, 429 U.S. 887 (1976); see Loya v. Immigration & Naturalization Service, ___ F.2d ___, ___ (9th Cir. Oct. 13, 1978), slip op. at 3356. The district court held that summary judgment was appropriate because as a matter of law Gard could not recover even when the facts were considered in the light most favorable to him. We agree.

III. Effect of Nevada Sightseer Statute

The Federal Tort Claims Act, under which Gard sues, allows plaintiffs to recover damages against the Government for injury

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances . where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Noting that the parties agreed that Gard was engaged in "sightseeing" and "recreational" activities when injured and that he had not received permission from the United States to enter the mine, the district court referred to Nevada Revised Statutes § 41.510(1):

> An owner . . . of premises owes no duty to keep the premises safe for entry or use by others for . . . sightseeing,or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on such premises to persons entering for such purposes, except as provided in subsection 3 of this section.

Subsection 3 provides in relevant part:

> This section does not limit the liability which would otherwise exist for:
>
> (a) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

The district court concluded:

> Thus, plaintiff cannot recover damages under Nevada law, and, hence, the Federal Tort Claims Act, unless he can show that a federal employee willfully or maliciously failed to guard or warn against the danger presented by the mine.

420 F.Supp. at 302 (footnote omitted).

On appeal, Gard contends that § 41.510 does not apply to the Government. He argues first that the purpose of § 41.510 is to encourage landowners to open up their land to recreational use and that such a rationale does not apply to the Government. We disagree. Gard does not suggest that the Government could not completely close various federal lands to public use if it felt its potential tort liability was too great. Thus the principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the Government as to other landowners.

Second, Gard refers to a Wisconsin decision holding that the Wisconsin sightseer statute did not apply to a municipality. Goodson v. Racine, 61 Wisc.2d 554, 213 N.W.2d 16, 19 (1973). The Wisconsin Supreme Court noted that "[t]he legislative intent of the statute is obvious" in limiting its scope to private individuals. Id. By contrast, where statutes have not been explicitly limited to private individuals, the federal courts have held that they may apply to the United States under the Federal Tort Claims Act. See, e.g., Blair v. United States 433 F.Supp. 217, 219 (D.Nev. 1977) (§ 41.510); Hamilton v. United States, 371 F. Supp. 230, 233-34 (E.D. Va. 1974). Such application is consistent with Congress' direction in § 1346(b) that the Government should be treated as would be a

"private person" under applicable state law. See Martin v. United States, 546 F.2d 1355, 1361 (9th Cir. 1976), cert. denied, 432 U.S. 906 (1977); Smith v. United States, 546 F.2d 872, 878-79 (10th Cir. 1976); Hamilton, 371 F.Supp. at 233.

We conclude that the district court properly applied the Nevada sightseer statute and that Gard could recover only by showing willful or malicious failure to guard or warn.

The district court rejected Gard's assertion that the required willfulness could be found in the Government's failure to put warnings or a fence around the mine. The district court noted:

> The Nevada legislature clearly envisioned limiting liability under its statute to landowners who intentionally allow dangerous structures to remain unguarded and without warning, with the knowledge that someone will be injured. Under Nevada law, in order for a defendant to commit a willful injury, "'there must be design, purpose and intent to do wrong and inflict the injury * * *.'" Crosman v. Southern Pacific Co., 44 Nev. 286,194 P. 839, 843 (1921); Rocky Mountain Produce Trucking Co. v. Johnson, 78 Nev. 44, 369 P.2d 198, 201 (1962). Similarly, malicious acts are those done intentionally without justification or excuse. See Linkhart v. Savely, 190 Or. 484, 227 P.2d 187, 197 (1951).

420 F.Supp. at 302. Applying this standard the court found:

> The undisputed facts of this case fail to show that defendant or any of its employees willfully or maliciously failed to guard or warn against the mineshaft that caused plaintiff's injuries. There is no evidence that any employee of the United States had ever even inspected the mine. [An affidavit from the Supervisory Mining Engineer for the Nevada State Office of the United States Bureau of Land Management] stated that in the 10 years he has overseen the Bureau's mineral management program in Nevada, he has never noticed any activity or persons in the vicinity of the two mines involved here, has never received any other expression of concern about the

> mines' safety from members of the public or federal employees, and has never heard of any other accident involving either mine. He also states that to his knowledge no Bureau of Land Management employee had even been in either mine before the accident in this case.

Id. at 302-03.

Gard responds that the district court employed too strict a test of willfulness. He argues that the court should have limited Crosman's definition of willful to the context of willful injury and not to willful failure. He asks that this court adopt what he considers the superior definition of willfulness employed in a decision of the Georgia Court of Appeals, reversed by the Georgia Supreme Court on other grounds. McGruder v. Georgia Power Co., 126 Ga.App. 562, 191 S.E.2d 305 (1972), rev'd, 229 Ga. 811, 194 S.E.2d 440 (1972). Gard claims that willfulness according to the McGruder definition can be proved.

Gard, however, ignores the congressional instruction that under the Federal Tort Claims Act, "the law of the place where the act or omission occurred" should apply. 28 U.S.C. § 1346(b); see Martin, 546 F.2d at 1361; Smith, 546 F.2d at 878-79; Blair, 433 F.Supp. at 219; Hamilton, 371 F.Supp. at 233. Thus the district court could not choose to follow whatever law it felt to be most enlightened. And Crosman did not limit its definition of willfulness to willful injury. In Crosman, a plaintiff sought to establish that the defendant had acted willfully or wantonly in failing to protect plaintiff from injury on defendant's railroad tracks, so as to circumvent the defense of contributory

negligence. After adopting ""a general definition of what constitutes . . . willful or wanton conduct as will warrant recovery of damages by an injured party, notwithstanding his own contributory negligence," the Nevada Supreme Court wrote:

> It clearly appears that the conduct of respondent's employees could not have been due to willfulness, that is to say, to a design to inflict injury. The evidence shows conclusively that appellant's presence on the track was unknown to them and was not discovered before the collision . . . .
>
> Under all the circumstances in evidence, we have no hesitancy in holding that the lower court was justified in withholding the case from the jury as to any element of willfulness.

44 Nev. at , 194 P. at 843-44. The district court found this same essential element lacking here. 420 F.Supp. at 302-03.[1/]

In short, though we are reluctant to approve of summary judgment where willfulness is an issue,[2/] summary judgment was proper here in light of the district court's finding that "[t]he undisputed facts of this case fail to show that defendant . . . willfully or maliciously failed to guard or warn . . . ." Id. at 302.

IV. Fencing Statute

Gard refers to Nevada Revised Statutes § 455.010, requiring that the owner

> of any shaft, excavation, or hole [shall] cause to be erected, good and substantial fences or other safeguards, and keep the same in good repair, around such works or shafts, sufficient to guard securely against danger to persons and animals from falling into such shafts or excavations.

He claims that there is a triable issue of fact as to whether the Government violated this statute. The district court

noted, however, that violation of the statute, even if proved,[3] would constitute evidence of negligence or at most negligence per se. A showing of negligence would not be sufficient to invoke subsection (3) so as to circumvent the sightseer statute's limitation on recovery. See Crosman, 44 Nev. at 194 P. at 845; W. Prosser, Law of Torts 200-02 (4th ed. 1971).

In his reply brief Gard argues that "the defendant's willful action violated Nevada Revised Statute 455.010 which, under Nevada law, would impose liability . . . ." If Gard is arguing that the Government willfully failed to guard or warn, the district court's finding that there was no evidence of willfulness is a sufficient response. See Part II supra. If Gard is arguing that the Government's violation of a statute creates liability, then the sightseer statute bars recovery as noted supra. Thus the district court was correct in rejecting Gard's claim based on § 455.010.[4]

V. Constitutional Claim

Gard raises constitutional challenges to § 41.510 before this court that were not raised in the court below. Gard acknowledges that "[t]he general rule is that an issue will not be considered for the first time on appeal." He contends that because of the significance of the issue and the possibility of injustice, this court in its discretion should consider the claims.

Gard offers no exceptional circumstances explaining why these claims could not have been raised in the district court. Mindful of "[t]he importance of the rule" against

raising claims for the first time before this court ""to the practical administration of the judicial system," we decline to address the constitutional claims. Westinghouse Electric Corp. v. Weigel, 426 F.2d 1356, 1357 (9th Cir. 1970); see Frommhagen v. Klein, 456 F.2d 1391, 1395 (9th Cir. 1972).

AFFIRMED.

NOTES

1. [reference on page 7:]

The very decision upon which Gard relies refutes his apparent contention that a case specifically dealing with willfulness in the context of an injury claim cannot apply to the definition of willfulness in other contexts. The Georgia Court of Appeals in McGruder based its definition of willfulness on Carpenter v. Forshee, 103 Ga.App. 758, 120 S.E.2d 786 (1961). That case dealt with willful or wanton failure to comply with a support decree. Carpenter in turn based its definition on cases involving willfully swearing falsely, King v. State, 103 Ga. 263, 30 S.E. 30 (1898), willfully attempting to influence a juror, Richardson v. State, 43 Ga.App. 229, 158 S.E. 369 (1931), and willfully abandoning a child, McComas v. Glendinning, 59 Ga.App. 234, 200 S.E. 304 (1938). In short, we must reject Gard's contention that the district court was free to ignore the law enunciated by the Nevada Supreme Court in Crosman and choose whatever law it felt wisest.

2. [reference on page 7:]

Gard also argues that the court should be very wary of granting summary judgment when issues like willfulness--which may involve questions of individuals' intent or motive--are at issue. We agree. But the existence of such questions, usually considered by the trier of facts, does not prevent use of summary judgment when the requirements for summary judgment are nonetheless satisfied. See Flying Diamond Corp. v. P. Pennaluna & Co., ____ F.2d ___, ___ (9th Cir. Nov. 20, 1978), slip op. at 3838.

3. [reference on page 8:]

Because of our holding, we need not discuss the district court's alternative reasons for rejecting Gard's § 41.010 claim.

4. [reference on page 8:]

Gard contends that this court should reverse the summary judgment because subsequent to oral argument on the summary judgment motion, one deponent changed a portion of his deposition. Specifically, in the original version the Government deponent acknowledged that the area in which the accident took place was "designated a recreational area." He later corrected the deposition to say that it was not designated a "recreational area." Gard's attorneys claim that they did not know of this change until after reading the Government's briefs in this appeal.

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Gard claims that this change was significant because McGruder means that "one of the elements of the test to establish willfulness is actual knowledge that the property is being used for recreational purposes." Aside from the impropriety of using McGruder, see Part II supra, even if the deposition had not been amended, the Government deponent would simply have indicated that the area had been designated a recreational area. We are convinced that given the correctness of the district court's conclusion that there was no evidence of willfulness, it would not have changed the result whether the court considered the amended or unamended version of the deposition.

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APPENDIX C

ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS S. GARD,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 77-1484

ORDER

Before: MOORE,* WRIGHT and CHOY, Circuit Judges.

Appellant's petition for rehearing is denied.

The disposition, which was filed as an unpublished Memorandum, shall be published as a per curiam Opinion and the Clerk shall so amend the caption of the disposition.

*The Honorable Leonard P. Moore, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, Article IV, Section 3, Clause 2:

Public Lands: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

UNITED STATES CONSTITUTION, Article VI, Clause 2:

Supreme Law of Land: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

Citizenship; privileges and immunities; due process; equal protection. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEVADA STATE CONSTITUTIION, Article 4, Section 21:

"General laws shall have uniform operation. In all cases enumerated in the preceding section, and in all other cases where

a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."

FEDERAL TORT CLAIMS ACT, 28 UNITED STATES CODE, Section 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employement, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

NEVADA REVISED STATUTE SECTION 41.130:

"Liability of persons and fellow servants causing injury. Whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages; and where the person causing such injury is employed by another person or corporation responsible for his conduct, such person or corporation so responsible shall be liable to the person injured for daages."

NEVADA REVISED STATUTES SECTION 41.510:

Sightseer and Recreational Use Statute: "Liability of owners, lessees and occupants of premises to persons using premises for hunting, fishing, trapping, camping, hiking, sightseeing or other recreational purposes; users acquire no property rights.

"1. An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, camping, hiking, sightseeing, or for

any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on such premises to persons entering for such purposes, except as provided in subsection 3 of this section.

"2. When an owner, lessee or occupant of premises gives permission to another to hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities, upon such premises:

(a) He does not thereby extend any assurance that the premises are safe for such purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted, except as provided in subsection 3 of this section.

(b) Such person does not thereby acquire any property rights in or rights of easement to such premises.

"3. This section does not limit the liability which would otherwise exist for:

(a) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

(b) Injury suffered in any case where permission to hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities, was granted for a consideration other than the consideration, if any, paid to the landowner by the state or any subdivision thereof.

(c) Injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

"4. Nothing in this section creates a duty of care or ground of liability for injury to person or property."

NEVADA REVISED STATUTES SECTION 41.180:

"Guest defined; liability of vehicle owner or operator for death or injury of guest.

"1. For the purpose of this section, the term 'guest' is defined as being a person who accepts a ride in any vehicle without giving compensation therefor.

"2. Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of Nevada, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. In the event that such person while so riding as such guest is killed, or dies as a result of injury sustained while so riding as such guest, then neither the estate nor the legal representatives or heirs of such guest shall have any right of recovery against the driver or owner of the vehicle by reason of the death of the guest. If such person so riding as a guest be a minor and sustain an injury or be killed or die as a result of injury sustained while so riding as such guest, then neither the parents nor guardian nor the estate nor legal representatives or heirs of such minor shall have any right of recovery against the driver or owner or person responsible for the operation of the vehicle for injury sustained or as a result of the death of such minor.

"3. Nothing contained in this section shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, willful misconduct or gross negligence of such owner, driver or person responsible for the operation of such vehicle; provided, that in any action for death or for injury or damage to person or property by or on behalf of a guest, or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such intoxication, willful misconduct or gross negligence was the proximate cause of such death or injury or damage." (Repealed)

NEVADA REVISED STATUTES SECTION 455.010:

"Erection of fences, safeguards around shafts, excavations required. Any person or persons, company or corporation, who shall dig, sink or excavate, or cause the same to be done, or being the owner or owners, or in the possession under any lease or contract, of any shaft, excavation or hole, whether used for mining or otherwise, or whether dug, sunk or excavated for the purpose of mining, to obtain water, or for any other purpose, within this state, shall, during the time they may be employed in digging, sinking or excavating, or after they may have ceased work upon or abandoned the same, erect, or cause to be erected, good and substantial fences or other safeguards, and keep the same in good repair, around such works or shafts, sufficient to guard securely against danger to persons and animals from falling into such shafts or excavations."

CODE OF FEDERAL REGULATIONS TITLE 30, Section 57.20-20:

"Mandatory. Access to unattended mine openings shall be restricted by gates or doors, or the openings shall be fenced and posted.

CODE OF FEDERAL REGULATIONS TITLE 30, Section 57.20-21:

"Mandatory. Upon abandonment of a mine, the owner or operator shall effectively close or fence off all surface openings down which persons could fall or through which persons could enter. Upon or near all such safeguards, trespass warnings and appropriate danger notices shall be posted."

DATED: July, 1979.

No. 79-65

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS S. GARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-65

DOUGLAS S. GARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in granting summary judgment for the government on the ground that as a matter of Nevada law he could not recover under the Federal Tort Claims Act.

1. This is an action brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, to recover damages for injuries petitioner suffered as a result of his fall down a vertical shaft within an abandoned mine located on federal land in Nevada. The accident occurred in 1972 when petitioner, while on an automobile trip with three fellow college students, stopped along Interstate 50 in Nevada to inspect an abandoned mine located approximately 200 yards from the highway. After examining the mine, petitioner and his three companions proceeded to explore another mine that was not visible from the highway. They entered the second mine through a horizontal shaft cut into the side of the hill. After

proceeding approximately 100 feet into the mine, petitioner, who was leading the way, fell into a vertical shaft. The fall caused him to become a permanent quadriplegic (Pet. App. A 1-2).

Petitioner then filed this action in the United States District Court for the Northern District of California, contending that the government had been negligent in not protecting him from the dangers associated with the abandoned mine. The district court rejected this contention and entered summary judgment for the government, relying upon a Nevada statute[1] providing that a landowner owes no duty to keep his premises safe for entry or use by others for sightseeing or recreational purposes or to give warning of any hazardous condition, activity or use of any structure on the premises, except, *inter alia*, where the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity. Nev. Rev. Stat. § 41.510 (1975) (Pet. App. D 2-3). The court found that it was undisputed that petitioner was engaged in sightseeing or other recreational activities when he incurred his injuries and therefore held that petitioner could not recover unless he could show that "a federal employee willfully or maliciously failed to guard or warn against the danger presented by the mine" (Pet. App. A 3).

The district court concluded that in order for a defendant to cause a willful injury under Nevada law, there must be a " 'design, purpose and intent to do wrong and inflict the injury' " (Pet. App. A 4, quoting *Crosman* v. *Southern Pacific Co.*, 44 Nev. 286, 301, 194 P. 839, 843 (1921)). Finding that "[t]he undisputed facts of this case

[1]The Federal Tort Claims Act treats the federal government as "if a private person" and imposes liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

fail to show that defendant or any of its employees willfully or maliciously failed to guard or warn against the mineshaft that caused [petitioner's] injuries" (Pet. App. A 4), the court granted summary judgment for the government. The court noted that "[t]here is no evidence that any employee of the United States had ever even inspected the mine" (*ibid.*) and referred to the unchallenged testimony of the principal federal official involved "that in the 10 years he has overseen the [U.S. Bureau of Mines'] mineral management program in Nevada, he has never noticed any activity or persons in the vicinity of the two mines involved here, has never received any other expression of concern about the mines' safety from members of the public or federal employees, and has never heard of any other accident involving either mine" (*id.* at 4-5).

The district court also rejected petitioner's contention that the government was liable because it had allegedly violated a Nevada statute requiring the owner of any "shaft, excavation or hole" to erect fences or other safeguards "sufficient to guard securely against danger to persons and animals from falling into such shafts or excavations." Nev. Rev. Stat. § 455.010 (1973) (Pet. App. D 5). The court concluded that the statute was inapplicable because it was intended to require erection of safeguards only around vertical shafts to prevent people or animals from inadvertently "falling into" the shaft, not around horizontal shafts that may be entered voluntarily by an individual (Pet. App. A 5-6). The court further concluded that petitioner could not recover even if the United States had violated the Nevada statute, because violation of the statute would only be evidence of negligence or at most negligence per se, and, as the court had previously ruled, the United States could be held liable only if any acts or omissions by federal employees

resulting in petitioner's injuries were willful or malicious (*id.* at 7).

The court of appeals affirmed, concluding that "summary judgment was proper here in light of the district court's finding that '[t]he undisputed facts of this case fail to show that defendant . . . willfully or maliciously failed to guard or warn . . . .' " (Pet. App. B 7). The court of appeals agreed with the district court that the Nevada statute requiring safeguards around shafts was of no assistance to petitioner, because violation of that statute would only constitute evidence of negligence or negligence per se (*id.* at i n.3). The court also rejected petitioner's contention that the Nevada statute governing a landowner's liability to sightseers did not apply to the United States, and it refused to consider petitioner's constitutional challenge to the sightseer statute because that challenge had not been raised in the district court (*id.* at 4-5, 8-9).

2. a. Petitioner contends that the district court erred in applying the Nevada sightseer statute in this case. But there is nothing on the face of the Nevada statute to suggest that it should not be applied to public as well as private lands. Compare *Goodson* v. *City of Racine*, 61 Wis. 2d 554, 559, 213 N.W.2d 16, 19 (1973). Nor is there any reason why the evident legislative purpose of encouraging landowners to make their premises available for recreational purposes by limiting their liability to persons entering for such purposes would not be furthered by applying the statute to public lands (Pet. App. A 4; Pet. App. B 4-5). Petitioner suggests, however (Pet. 13), that because the injury occurred on federal land, "[i]t is a logical and legal incongruity to apply a state law." It has consistently been held, however, that state law governs tort claims that arise in such federally controlled areas. See, *e.g.*, *United States* v. *Muniz*, 374 U.S. 150, 153 (1963) (federal prison). There is nothing more "distinctively federal in character" (*Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671 (1977)) in the ownership of land than there is in the operation of a federal prison to suggest that state law should not be followed here. As the court of appeals noted (Pet. App. B 4), the United States could presumably close various federal lands to public use if it felt that its potential tort liability was too great, and the principle of encouraging landowners to open their land therefore applies with equal force to the federal government.

b. Petitioner asserts (Pet. 13-18) that, even if the Nevada sightseer statute is applicable, summary judgment was improper because there was sufficient evidence to give rise to a triable issue concerning the willful failure of the United States to guard or warn against the dangerous condition inside the mine. Underlying this assertion is the further argument that both lower courts erred in concluding that under Nevada law intent is an element of a willful failure to warn. But Nevada law demonstrably does require a showing that willful acts be done with the intent to do wrong and cause injury (see Pet. App. A 4), and petitioner's reliance on decisions in other jurisdictions (Pet. 14-15) is therefore to no avail. There is also no basis for petitioner's unsupported assertion (Pet. 16) that intent to do wrong and inflict injury need not be shown where, as here, the claim is that there has been a failure to act. In any event, these issues of state law do not warrant this Court's review.

c. Finally, petitioner argues (Pet. 20-23) that the Nevada sightseer statute is unconstitutional because it irrationally discriminates between recreational and non-recreational users and between paying and non-paying recreational users. The court of appeals properly declined to consider this issue because it was presented for the first time on appeal. *Hormel* v. *Helvering*, 312 U.S. 552, 556

(1941). There is, for similar reasons, no occasion for this Court to consider it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-08

No. 79-65

IN THE

Supreme Court of the United States

October Term, 1978

DOUGLAS S. GARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO MEMORANDUM IN OPPOSITION

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TABLE OF AUTHORITIES CITED

Cases

Statute

No. 79-65

IN THE

Supreme Court of the United States

October Term, 1978

DOUGLAS S. GARD, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO MEMORANDUM IN OPPOSITION

The United States has opposed the petition for a writ of certiorari on the ground that the district court properly applied the Nevada sightseer statute in determining that, as a matter of law, petitioner could not recover under the Federal Tort Claims Act. It is the contention of the United States that a state

statute of this kind, enacted for the purpose of encouraging landowners to open land to the public for recreational use, is just as applicable to open public domain land as it is to privately owned land which is reserved for private use. It is also the contention of the United States that even though the Nevada statute has never been interpreted by the Nevada courts, the lower courts were correct in concluding that in order to impose liability under this statute for a willful failure to guard, or to warn against, a dangerous condition, use, structure or activity, it is incumbent upon the injured person to show that the failure was not only willful, but also that it was the result of a design, purpose and intent to do wrong and to inflict injury. Inasmuch as no federal employee admitted that he intended to cause injury to those members of the public who were likely to enter unguarded and unprotected abandoned mines, an activity which was well known to the responsible federal officials, the United States has defended the holding of the lower courts that there was no evidence of any willful failure on the part of the United States to guard or warn against the mineshaft into which the plaintiff fell. Finally, the United States has declined to discuss petitioner's challenge to the constitutionality of the Nevada statute, taking refuge behind the court of appeal's refusal to consider this important issue.

1. In its Memorandum in Opposition the United States has misinterpreted the state of the evidence presented to the district court in the summary judgment proceeding. On page 1 of its Memorandum the United States has asserted that the abandoned mine in which the plaintiff's accident occured "was not

visible from the highway." To the contrary, there was evidence that it was visible from the highway. Richard Merrit, one of the young men who accompanied the plaintiff, so testified. (R. Merrit DEPO, p. 19, lines 2-4).[1] A photograph submitted to the district court during the hearing shows that both mines were visible from the highway. (R.R.T., January 15, 1976, p. 9). Mr. McAlexander, an employee of the Mining Enforcement and Safety Administration,[2] testified that when he went to the mine to investigate the plaintiff's accident, the mines were visible from the highway. (R. McAlexander DEPO, p. 34, line 25 - p. 35, line 1).

On page 3 of its Memorandum the United States has referred to "the unchallenged testimony of the principal federal official involved" that he had never noticed any activity or persons in the vicinity of the mine in which the plaintiff was injured, had never received any expressions of concern about its safety and had never heard of any other accident involving this mine. The characterization of this testimony as "unchallenged" is somewhat inaccurate. The witness was Mr. Webb, the Supervisory Mining Engineer for the Nevada State Office of the Bureau of Land Management.[3] Mr. Webb did give an affidavit setting forth the matters mentioned by the United States. (R.C.R., p. 102). However, in his deposition he testified that the Bureau was not concerned with mine

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[1] References to the record herein shall be designated as "R" with the following designations: Clerk's record - C.R.; Reporter's Transcript - R.T., date, p.; Depositions - name of the party, DEPO. p.

[2] Hereinafter referred to as MESA.

[3] Hereinafter referred to as Bureau.

safety. This was handled by MESA, and Mr. Webb denied any responsibility for the enforcement of MESA regulations pertaining to abandoned mines. (R. Webb DEPO, pp. 10, 12, 31, 32). The Bureau was not involved in the investigation of plaintiff's accident. (R. Webb DEPO, p. 13). Although it was the function of the Bureau to manage public domain lands, it had no specific system for inspecting the land to see if it is being used properly. (R. Webb DEPO, p. 20). If the Bureau became aware of a dangerous condition of public domain land, it had no system for taking any precautionary action, except perhaps on a developed recreational site. (R. Webb DEPO, pp. 22-23, 35). To Mr. Webb's knowledge the government never established any program to inspect, cover up, bar, close or warn about abandoned or inactive mines on its land, other than the MESA regulations. (R. Webb DEPO, pp. 29-30, 39). He did not regard any Nevada statutes, including those imposing duties to bar up and post abandoned mines, as controlling his behavior in the management of federal lands. (R. Webb DEPO, pp. 33-35). Mr. Webb was aware that people on occasion went into inactive mines, he knew that such mines had vertical shafts in them. (R. Webb DEPO, pp. 37-39). He had read newspaper reports about accidents involving persons exploring mines. (R. Webb DEPO, pp. 38, 40).

Mr. McAlexander, the MESA employee, testified that he knew of incidents in which persons had fallen into mine shafts. (R. McAlexander DEPO, pp. 17-18). He stated that MESA was aware of the existence of many abandoned mines, and he acknowledged that these openings do constitute a hazard, mostly to human

beings. (R. McAlexander DEPO, pp. 12-13). Anybody who has been around the mining industry knows that it is dangerous for people to be around abandoned mine shafts. (R. McAlexander DEPO, pp. 43-44). MESA did nothing to enforce its regulations relating to abandoned mines, because it allegedly did not understand how they were to be enforced. (See R. McAlexander DEPO, pp. 9-10).

It is apparent that Mr. Webb's "unchallenged" denials were meaningless. Since he disavowed any responsibility for safety in the area of the accident, he obviously paid no heed to any activity or hazards there, and there was no reason why anyone should express concern to him or report any accidents to him. The evidence presented to the district court showed that the MESA employees were aware of the existence of the mines in question, the propensity of persons to explore such mines, the dangers involved in any abandoned mine, and the occurrence of prior accidents. Yet MESA remained totally indifferent, passive and quiescent, neglecting to enforce even its own regulations which would have undoubtedly alleviated the latent hazard which brought about the plaintiff's injuries.

2.a. The United States has cited *United States v. Munoz*, 374 U.S. 150, 153 (1963), for the proposition that state law will be applied in a federally controlled area, such as a federal prison. But in *Munoz* this Court held that since the Federal Tort Claims Act provided much-needed relief to those suffering injury from the negligence of government employees, restrictive state rules of immunity would not be allowed to limit suits by federal prisoners. By the same token, a

state law, such as the Nevada sightseer statute, which purports to grant immunity from liability for negligence in maintaining a dangerous condition on land, in order to induce the landowner to open that land to the public, is grossly inapplicable to the United States in its capacity as the owner of open public domain land. To apply such a restrictive statute to the United States would result in encouraging negligence on the part of those government employees who are entrusted with the management of public lands and it would significantly stultify the right of redress which the Federal Tort Claims Act was intended to afford to the public.

2.b. The United States has asserted that Nevada law "demonstrably" requires a showing that willful acts be done with intent to do wrong and cause injury. (Memorandum in Opposition, p. 5). However, the Nevada sightseer statute has never been interpreted by a Nevada state court. The earlier Nevada decisions cited by the lower courts in this case (*Crossman v. Southern Pacific Co.*, 44 Nev. 286, 194 Pac. 839 (1921) and *Rocky Mountain Produce Trucking Co. v. Johnson*, 78 Nev. 4, 369 P. 2d 198 (1962), in which some of the *Crossman* language was criticized, involved questions of active conduct rather than a failure to act.

Many states have adopted sightseer statutes, and the language concerning "willful failure" is virtually identical in these statutes. No state, so far as can be determined, has interpreted this language to mean a deliberate failure to act with a purpose and intent to do wrong and to cause injury. Petitioner has previously cited *Miller v. United States*, 442 F. Supp. 555,

561 (N.D. Ill. E.D. 1976). The decision in that case has been affirmed in *Miller v. Unted States*, 597 F. 2d 614 (7th Cir. 1979). In another recent case involving the Illinois statutes, the district court held, after considering varying Illinois tests for "willfullness" in other contexts, that:

> "The key under any of these 'tests' is (1) the foreseeability of the danger, its probability and gravity of harm; (2) the knowledge of the defendant of the danger; (3) the actions which the defendant took in view of the first two factors. I am convinced that no spirit of ill will or intentional misconduct is essential to prove willfulness. Rather it is conduct which takes on the aspect of highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. If such conduct is found, the plaintiff is entitled to recovery event though certain defenses would have prevented his recovery for ordinary negligence."
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> *Stephens v. United States*, 472 F. Supp. 998, 1016 (C.D. Ill. 1979).

If the Nevada statute, properly interpreted, requires that an intent to do wrong and to inflict injury must be superimposed upon the statutory requirement of willful failure to guard or warn against danger, it is apparent that the issue of intention involves the subjective state of mind of the agents or employees of the United States. It is peculiarly inappropriate to decide such an issue upon the basis of the documents submitted in a summary judgment proceeding. As stated in *Croley v. Matson Navigation Company*, 434 F. 2d 73, 77 (5th Cir. 1970):

> "The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of

state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind."

The United States has supported the holding of the lower courts that any violation of the Nevada fencing statute (Nev. Rev. Stat. Secion 455.010; Pet. App. D 5) would only constitute evidence of negligence or at most negligence per se. The Court of Appeal held that such a violation could not constitute willfulness in the light of the district court's conclusion that there was no evidence of willfulness. (Pet. App. B 8). Petitioner submits that (1) the district court's finding was based upon an erroneous interpretation of the Nevada sightseer statute and (2) there is no logical reason why a deliberate and intentional violation of the Nevada fencing statute should be subject to the same interpretative evaluation.

Moreover, to the extent that the United States' violation of the Nevada fencing statute involved a consideration of the state of mind of the government's agents and employees, the permissible inferences which could be drawn from the United States' deliberate refusal to comply with that statute, notwithstanding its knowledge of the danger involved in unguarded abandoned mines, gave rise to a triable issue of fact.

2.c. The United States has not answered petitioner's challenge to the constitutionality of the Nevada sightseer statute. It has cited *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) for the proposition that issues presented for the first time on appeal need not be considered. (Memorandum in Opposition, pp. 5-6). But in *Hormel* this Court upheld the appellate consideration of a new issue by the Court of Appeals. It was pointed

out that ordinarily issues not raised below will not be considered by an appellate court if these issues involved the presentation of evidence to support or defeat them. But this Court also noted that since the rules of practice and procedure are devised to promote the ends of justice, not to defeat them, it would be out of harmony with this policy to adopt a rigid and undeviating judicial practice to decline consideration of all questions not previously and specifically urged. This Court stated that:

"Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Hormel v. Helvering, supra, 312 U.S. 552, 557.

Petitioner submits that, just as in *Hormel*, to apply the general procedural rule in the case at hand would defeat rather than promote the ends of justice.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. NILAND,

MICHAEL G. BRISKI
Of Counsel.

Attorney for Petitioner.

I. EDWARD J. NILAND, a member of the Bar of the Supreme Court of the United States and counsel of record for DOUGLAS S. GARD, petitioner herein, hereby certify that on September 25, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Reply to Memorandum in Opposition by depositing such copies in the United States Post Office, 105 North First Street, San Jose, California 95113, with first-class postage pre-paid, properly addressed to the post office address of Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

DATED: September 25, 1979.

EDWARD J. NILAND

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